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COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

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KENNETH C. BURTON, as Personal Representative of the ESTATE OF CESAR GABRIEL MAYA, and on behalf of STEPHANIE GUADALUPE MAYA TRIUJEQUE and DIEGO HANNIEL MAYA TRIUJEQUE,

KENNETH C. BURTON, as Personal Representative of the ESTATE OF JESUS ARCINIEGA NIETO, and on behalf of ANGELICA MARGARITA ARIZMENDI GUADARRAMA, ESTEFANIA ARCINIEGA ARIZMENDI, JOSE FRANCISCO ARCINIEGA PEREZ and CONSUELO NIETO TAPIA, and

Respondent's Brief

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OF MARIANELA ELIZARDI RIOS, and on behalf of MARIANELA
AIDA QUEZADA ELIZARDI and AIDA MAGDALENA RIOS DE
ELIZARDI,**

Appellants,

v.

**TWIN COMMANDER AIRCRAFT, L.L.C., formerly known and
doing business as TWIN COMMANDER AIRCRAFT
CORPORATION,**

Respondent.

BRIEF OF RESPONDENT

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The statute of repose in the General Aviation Revitalization Act (“GARA”) bars certain claims arising out of accidents involving general aviation aircraft that are more than 18 years old. Plaintiffs brought these actions against Twin Commander Aircraft LLC (“Twin Commander”) in the Superior Court of King County seeking damages stemming from a May 2, 2004, aircraft accident that occurred near Aguascalientes, Mexico. The accident involved a Twin Commander Model 690C general aviation aircraft, which aircraft was manufactured and sold to its first purchaser in 1981. Twin Commander filed a motion for summary judgment based on GARA’s 18-year statute of repose establishing that no material facts were in dispute as to GARA’s applicability, and requesting judgment in its favor.

Plaintiffs responded by raising two statutory exceptions to GARA’s 18-year statute of repose: GARA’s rolling provision for replacement parts and its fraud exception. In invoking these two exceptions, Plaintiffs’ contentions are at times inconsistent, often misleading, and always directly in conflict with established case law and authority. Specifically, Plaintiffs contend that a service bulletin published in 2003 requiring a one-time rudder inspection constitutes a replacement part of the aircraft, which Plaintiffs argue commenced a new 18-year repose period. Alternatively, Plaintiffs contend that Twin Commander committed fraud on the FAA by intentionally misrepresenting and withholding information that was causal to the accident, thereby implicating GARA’s fraud exception to the statute of repose.

After extensive discovery and exhaustive briefing on the GARA issues, the Honorable Bruce Hilyer held a lengthy hearing and allowed Plaintiffs to file additional materials, while also requesting from Twin Commander additional briefing. Judge Hilyer thereafter rejected Plaintiffs' arguments in their entirety, finding that there are no material facts in dispute as to the applicability of GARA's statute of repose and that Twin Commander is entitled to judgment as a matter of law.

I. STATEMENT OF THE ISSUES

A. Whether the 18-year federal statute of repose in GARA bars claims against a current type-certificate holder arising from an accident involving an aircraft manufactured and delivered 22 years prior to the accident.

B. Whether a plaintiff may invoke GARA's rolling provision that commences a new 18-year repose period for replacement parts by predicating their claim on a service bulletin that they contend failed to adequately address an aircraft design flaw.

C. Where the undisputed facts implicate GARA, whether a plaintiff can avoid the statute of repose without satisfying GARA's requirement of pleading and proving with specificity an intentional misrepresentation to or omission from the Federal Aviation Administration.

II. STATEMENT OF THE CASE

These consolidated actions involve an aircraft accident that occurred on May 2, 2004, near Aguascalientes, Mexico. (*See* CP 217

(Am. Compl. ¶¶ 9, 10.) The general aviation aircraft involved in the accident was a Twin Commander Model 690C, serial number 11678 (“accident aircraft” or “the aircraft”). The accident aircraft was manufactured by Gulfstream American Corporation and sold to its first purchaser more than twenty years before the accident, in 1981. (CP 4402-4405 (FAA Export Certificate of Airworthiness).) The aircraft was exported soon after delivery and in 2004 was owned and operated by Procuraduría General de la República (“PGR”), an agency of the Mexican government. (CP 217; 269 (Am. Compl. ¶ 8; Am. Answer ¶ 7).) At the time of the accident, the aircraft was being used to transport PGR employees and/or agents back from a job. (CP 217 (Am. Compl. ¶ 10).)

While Twin Commander did not manufacture the accident aircraft, it is the current type certificate holder for the Twin Commander 690C model aircraft. (CP 217 (Am. Compl. ¶ 6).) As the type certificate holder, Twin Commander is required to provide product support for the aircraft. *See, e.g.*, 14 C.F.R. §§ 21.3, 21.50, 25.1529, 25, App. H.

On April 16, 2003, Twin Commander issued Alert Service Bulletin 235 (“Service Bulletin 235”) entitled “Upper Rudder Structural Inspection.” (CP 219 (Am. Compl. ¶ 16).) Service Bulletin 235 is directed to owners and operators of various Twin Commander aircraft, and requires a detailed inspection of the rudder tip of the various aircraft to which the bulletin is applicable. (CP 219-220 (Am. Compl. ¶¶ 16-19).)

As explained in Service Bulletin 235, the impetus for the issuance of the service bulletin was two incidents involving Twin Commander

690B aircraft in which the fiberglass composite rudder tips appear to have departed the aircraft in flight, as well as some reports from the field of unusual wear on the leading edge of the rudder. (CP 16-23 (Service Bulletin 235).) The accident aircraft was included within Service Bulletin 235's scope, notwithstanding the fact that it had an aluminum rudder tip rather than the fiberglass composite rudder tip. (*See id.*) According to the Plaintiffs, the PGR complied with the requirements of Service Bulletin 235 with regard to the accident aircraft. (CP 220-221 (Am. Compl. ¶ 20).)

In their Amended Complaints, Plaintiffs allege that the rudder tip and rudder assembly on the accident aircraft separated from the aircraft in flight, making the aircraft impossible to control and causing the accident giving rise to this lawsuit. (CP 218 (Am. Compl. ¶ 11).) Plaintiffs' claims sound in negligence and strict products liability under the Washington Product Liability Act, RCW 7.72. (CP 221 (Am. Compl. ¶ 22).) Rather than explicitly basing their claims on the allegation that the rudder and/or aircraft were defective, Plaintiffs instead contend that their claims "relate solely and only to Service Bulletin 235." (*See id.*) According to Plaintiffs, Service Bulletin 235 constitutes the defective "product" giving rise to their claims. (CP 221-222 (Am. Compl. ¶¶ 22, 23).)

Twin Commander filed a Motion for Summary Judgment based on GARA's statute of repose. After reviewing the extensive briefing on the issues and hearing argument, the trial court ruled that the undisputed facts established that Twin Commander was entitled to judgment in its favor as a matter of law. (CP 5383-5386 (Order Granting Summ. J.).)

III. ARGUMENT

A. Standard of Review.

“When reviewing a summary judgment order, an appellate court engages in the same inquiry as the trial court.” *Reynolds v. Hicks*, 134 Wn.2d 491, 495, 951 P.2d 761 (1998). “Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” *Id.*; *see also* CR 56(c). “[Q]uestions of law are reviewed de novo.” *Wilson Court Ltd. P’ship v. Tony Maroni’s, Inc.*, 134 Wn.2d 692, 698, 952 P.2d 590 (1998). An appellate court “will sustain the trial court’s judgment upon any theory established in the pleadings and supported by proof.” *Id.*

B. Congress Enacted the General Aviation Revitalization Act to Address Enormous Litigation Costs Associated With Defending Claims Related to General Aviation Aircraft.

The General Aviation Revitalization Act of 1994¹ bars certain claims arising from accidents involving general aviation aircraft that are brought more than eighteen years after the aircraft’s delivery to its first purchaser. GARA provides, in relevant part:

[N]o civil action for damages for death or injury to persons or damage to property arising out of an accident involving a general aviation aircraft may be brought against the manufacturer of the aircraft . . . in its capacity as a manufacturer if the accident occurred –
1) after the applicable limitation period [18 years] beginning on –

¹ GARA was codified as a note to 49 U.S.C. § 40101. For purposes of this motion, further citations to the statute will be to “GARA.”

- A) the date of delivery of the aircraft to its first purchaser or lessee, if delivered directly from the manufacturer; or
- B) the date of first delivery of the aircraft to a person engaged in the business of selling or leasing such aircraft.

GARA § 2(a).

Congress enacted GARA to address serious concerns regarding “the enormous product liability costs” our tort system had imposed on the general aviation industry. *See Lyon v. Agusta S.p.A.*, 252 F.3d 1078, 1084 (9th Cir. 2001). The long tail of liability associated with such aircraft created decades of potential liability for type-certificate holders. The enactment of GARA was a deliberate attempt to boost the aviation industry by relieving it from the heavy burden of litigation costs. H.R. Rep. No. 103-525, pt. 1, at 2 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 1638, 1639. Congress sought to provide “some certainty” to the industry in the hope that it would spur the development of jobs. *Id.* pt. 2, at 6-7, *as reprinted in* 1994 U.S.C.C.A.N. 1644, 1648. Congress was so concerned with providing “certainty” to the aviation industry, that it took the extraordinary step of expressly preempting state law. *See* GARA § 2(d).

Congress’s rationale behind the adoption of GARA’s statute of repose rested, in part, on the recognition of the aviation industry’s need for relief from endless liability, as well as on the level of protection already afforded the public by the extensive federal regulatory control of the aviation industry. H.R. Rep. No. 103-525, pt. 1, at 3. Congress relied upon studies indicating that “nearly all defects are discovered during the early years of an aircraft’s life” and only a small percentage of accidents

are caused by design or manufacturing defects. *Id.* Furthermore, Congress understood that products in the aviation industry are regulated “to a degree not comparable to any other [industry].” *See id.* pt. 2, at 4.

In addition to being a highly regulated industry, Congress also recognized that as an aircraft ages, the more likely it is to have had a number of owners and, correspondingly, the more difficult it is to ascertain whether the type-certificate holder was responsible for a mechanical failure, or whether one of the persons who had owned, used, or repaired the aircraft over the years was responsible for the mechanical failure. *See id.* pt. 1, at 4. Despite that uncertainty, however, suits were being brought against the manufacturer after the aircraft had been in use and demonstrated its safety for decades, and thus, the manufacturers were forced to incur substantial expenses defending lawsuits cases decades after the aircraft were first placed in service. *Id.* at 3. Congress expressed its confidence that “for those general aviation aircraft and component parts in service beyond the statute of repose, any design or manufacturing defect not prevented or identified by the Federal regulatory process by then should, in most instances, have manifested itself . . .” *Id.* pt. 2, at 6.

In short, Congress enacted GARA to provide much-needed relief to the general aviation industry from lawsuits arising from accidents involving aircraft sold more than 18 years prior to the accident to ensure the industry’s survival. Congress’s means of accomplishing this goal was through GARA’s 18-year statute of repose and its explicit preemption of state law claims.

C. There Is No Material Fact in Dispute.

Despite the fact that Plaintiffs having submitted thousands of pages of exhibits into the record, no dispute as to the facts relevant to Twin Commander's Motion for Summary Judgment exists. Instead, any dispute over the applicability of GARA is limited to the legal significance of undisputed facts. For example, it is undisputed that an accident occurred involving a general aviation aircraft resulting in a civil action for damages and that the accident aircraft was delivered to its first purchaser more than 18 years prior to the accident. (*See* Appellants' Br. at 3.) It is also undisputed that Twin Commander has held the type certificate for the Model 690C aircraft since 1989. (*See id.* at 3-4). While Plaintiffs challenge as erroneous the trial court's conclusion that these facts require application of GARA's statute of repose, it is undisputed that these material facts are supported by the record below.

D. There Is No Merit to Plaintiffs' Contention That Plaintiffs Were Held to an Improper Burden of Proof.

At various points throughout the Appellants' Brief, Plaintiffs contend that Twin Commander failed to meet its burden of proof for summary judgment. (Appellants' Br. at 3, 6, 10-12, 23.) Plaintiffs' argument demonstrates a fundamental misreading of appropriate summary judgment and GARA standards.

Summary judgment is appropriate "if the pleadings, affidavits, depositions and admissions on file demonstrate that there is no genuine issue as to any material fact and the party bringing the motion is entitled to judgment as a matter of law." *DuVon v. Rockwell Int'l*, 116 Wn.2d 749,

753 (1991) (citation omitted). Once the moving party demonstrates entitlement to summary judgment, the opposing party must go beyond the pleadings and designate specific facts to show that there is a genuine issue for trial. *White v. State*, 131 Wn.2d 1, 9 (1997). The opposing party may not rely on speculation or argumentative assertions that unresolved factual issues remain. *White*, 131 Wn.2d at 9. If the evidence is merely colorable or is not significantly probative, summary judgment should be granted. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986). Moreover, if the nonmovant “fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial,’ then the court should grant the motion.” *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225 (1989) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). Further, GARA is “a classic statute of repose.” *Lyon*, 252 F.3d at 1084; *see also Robinson v. Hartzell Propeller, Inc.*, 454 F.3d 163, 165 (3d Cir. 2006) (“[GARA] contains a statute of repose. . . .”). A statute of repose does not simply create a defense that comes into existence if and when the defendant elects to assert it. Instead, without any affirmative action or assertion by the defendant, a statute of repose completely extinguishes any cause of action that falls within its terms, even claims that have not yet accrued.² *See, e.g., Luzadder v. Despatch Oven Co.*, 834 F.2d 355, 358 (3d Cir. 1987).

² “[A] statute of repose extinguishes the cause of action, the right, after a fixed period of time, usually measured from the delivery of the product or

Finally, the general rule is that a party seeking to avoid a statute's effect by invoking a statutory exception bears the burden of proof with regard to the exception. *See, e.g., Cowles Pub. Co. v. State Patrol*, 109 Wn.2d 712, 735 (1988) (construing exceptions to the public disclosure act and requiring a party seeking to invoke an exception to prove its applicability); *de Mello v. City of Seattle*, Wn. App. 766, 768-71 (1989) (placing the burden of proof on the defendant employer with regard to statutory exceptions involving the federal Equal Pay Act); *State v. Lawson*, Wn. App. 539, 542 (1984) (criminal defendant bore the burden of proving existence of an exception to statute barring consumption of

completion of work, regardless of when the cause of action accrued.” *Stuart v. American Cyanamid Co.*, 158 F.3d 622, 627 (2d Cir. 1998). “A statute of repose abolishes the cause of action after the passage of time [W]ith the expiration of the period of repose, the putative cause of action evanesces; life cannot thereafter be breathed back into it.” *Burlington Northern & Santa Fe Ry. Co. v. Poole Chem. Co.*, 419 F.3d 355, 363 (5th Cir. 2005) (internal citations omitted). “The injured party literally has no cause of action. The harm that has been done is *Damnum absque injuria*—a wrong for which the law affords no redress.” *P. Stolz Family Partnership L.P. v. Daum*, 355 F.3d 92, 103 (2d Cir. 2004) (internal citations omitted). *See also id.* at 102 (“[S]tatutes of repose affect the availability of the underlying right: That right is no longer available on the expiration of the specified period of time.” (internal citations omitted)). Several jurisdictions have thus recognized that a plaintiff has the burden to plead and/or prove that his or her cause of action is not barred by a statute of repose, thereby essentially making even the non-application of the statute of repose an element of the plaintiff's cause of action. *See, e.g., Anixter v. Home-Stake Prod. Co.*, 939 F.2d 1420, 1434 (10th Cir. 1991), *vacated on other grounds*, 503 U.S. 978 (1992) (plaintiff must plead and prove that claim is not barred by the 3-year statute of repose in the Securities Act of 1933, 15 U.S.C. § 78m); *Romani v. Cramer, Inc.*, 992 F. Supp. 74, 80 (D. Mass. 1998); *G & H Assocs. v. Ernest W. Hahn, Inc.*, 934 P. 2d 229, 233 (Nev. 1997); *Bolick v. American Barmag Corp.*, 293 S.E. 2d 415, 420 (N.C. 1982); *Chicopee, Inc. v. Sims Metal Works, Inc.*, 391 S.E.2d 211, 213 (N.C. Ct. App. 1990) (“If plaintiff fails to prove that its cause of action is brought before the repose period has expired, a directed verdict for defendant is appropriate, since plaintiff's case is insufficient as a matter of law.”).

alcohol by minors). This basic rule of statutory construction is true in the context of GARA, as well. *See, e.g., Willett v. Cessna Aircraft Co.*, 851 N.E.2d 626, 636-37 (Ill. App. 2006) (holding that a plaintiff bears the burden of proof with regard to GARA exceptions); *Carson v. Heli-Tech, Inc.*, No. 2:01-cv-643-FtM-29SPC, 2003 WL 22469919, at *1, *4 (M.D. Fla. Sept. 25, 2003) (requiring plaintiff to offer evidence sufficient to prove that a replacement part caused the accident in question); *Blazevska v. Raytheon Aircraft Co.*, No. C 05-4191 PJH, 2006 WL 1310455, at *1 (N.D. Cal. May 12, 2006) (placing the burden for each issue on the party bearing the burden of proof at trial).

Plaintiffs here seek to invoke two exceptions to GARA's 18-year statute of repose: one relating to GARA's rolling provision and the other involving GARA's fraud exception. Without citation to any relevant authority, Plaintiffs attempt to shift the burden to Twin Commander to prove that these exceptions do not apply. (Appellants' Br. at 3, 6, 10-12, 23.) Not only is this suggestion nonsensical—requiring Twin Commander to prove a negative—but it flies in the face of basic rules of statutory construction, all GARA precedent, and the language of GARA as well.

The burden of proffering facts sufficient to invoke one of GARA's exceptions lies with Plaintiffs, and because Plaintiffs failed to "make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial" summary judgment in favor of Twin Commander was required. *See, e.g., Celotex Corp.*, 477 U.S. at 322.

E. GARA's Statute of Repose Bars Plaintiffs' Suits.

- 1. Twin Commander is afforded the protections of GARA because it is deemed to be a manufacturer and it is being sued in that capacity.**

Manufacturers of aircraft are provided protection under GARA when sued in their capacity as a manufacturer. GARA § 2(a). While GARA does not define "manufacturer," courts uniformly extend GARA's protection to companies that have the airworthiness responsibilities of the original manufacturer. *See, e.g., Mason v. Schweizer Aircraft Corp.*, 653 N.W. 2d 543, 548-49 (Iowa 2002); *Carson*, 2003 WL 22469919, at *3 n.4; *cf. Burroughs v. Precision Automotive Corp.*, 93 Cal. Rptr. 2d 124, 132, 78 Cal. App. 4th 681, 692 (Cal. Ct. App. 2000). Courts have concluded that it would be contrary to Congress's intent to deny the protection of GARA to companies that have acquired the type certificate from the original manufacturer, as such companies have undertaken the responsibilities of the original manufacturer and are "part of the general aviation industry which GARA was specifically enacted to 'revitalize.'" *Mason*, 653 N.W. 2d at 548-49; *see also Burroughs*, 93 Cal. Rptr. 2d at 132. In construing GARA's protections to encompass subsequent type certificate holders, courts rely not just on legislative intent, but on other practical considerations as well. Under Federal Aviation Regulations ("FARs"), a type certificate holder is responsible for providing continued airworthiness support from the date it acquired the type certificate. 14 C.F.R. §§ 21.50; 25.1529; 25, App. H.

For example, in *Mason*, the court determined that it would be “contrary to Congress’s purpose” to deny the protection of GARA to a company that has “step[ped] into the shoes of the original manufacturer by acquiring the type certificate.” 653 N.W. 2d at 548-49. The court reasoned that where GARA shields the original manufacturer from a claim, a company that has taken over the continuing duties and obligations of the original manufacturer as to that product is also protected from liability for such claims. *Id.* All courts faced with this or similar issues have reached the same conclusion. *See, e.g., id.; Carson*, 2003 WL 22469919, at *3 n.4; *Burroughs*, 93 Cal. Rptr. 2d at 132.

Twin Commander, as the current type certificate holder for the Twin Commander 690C model aircraft, is required to provide continued airworthiness support to the fleet as of the date it acquired the type certificate. (CP 217 (Am. Compl. ¶ 6)); *see also* 14 C.F.R. §§ 21.3, 21.5, 21.50, 25.1529. Indeed, Plaintiffs themselves assert that “Twin Commander, as the current type certificate holder of the aircraft in question, had the duty and obligation to report to the [FAA] all relevant information concerning the problem it found associated with the rudder assembly on the aircraft in question.” (CP 224-230 (Am. Compl. ¶ 26).) Accordingly, as the type certificate holder, Twin Commander is afforded the protections of GARA as the “manufacturer” of the accident aircraft.

Moreover, Plaintiffs concede that their claims are predicated on the issuance of Service Bulletin 235. A service bulletin by definition is issued by the type certificate holder in its capacity as the manufacturer, as a

means of fulfilling is regulatory responsibilities to provide continuing airworthiness support. Plaintiffs themselves tie this Service Bulletin to Twin Commander's obligation to provide airworthiness support to the Twin Commander fleet. (Appellants' Br. at 3-5.) Thus, Twin Commander, as a type certificate holder with continuous airworthiness support responsibilities for this fleet of aircraft, is precisely the type of entity GARA was designed to protect. Through the issuance of the allegedly defective Service Bulletin 235—the linchpin of Plaintiffs' claim against Twin Commander—Twin Commander was quintessentially engaged in activities of a manufacturer and thus is entitled to all of the corresponding protections afforded by GARA. *Id.*

Not surprisingly, a federal district court, applying the reasoning discussed above, recently held that Twin Commander—as a type certificate holder—is a manufacturer for purposes of federal law. *Hasler Aviation, L.L.C. v. Aircenter, Inc.*, No. 1:06-CV-180, 2007 WL 2263171 (E.D. Tenn. Aug. 3, 2007). The *Hasler* court noted that it had “extensively researched the question of whether/when a type certificate holder and a manufacturer are synonymous. It seems this question has not been answered in this formation. Most courts assume type certificate holder and manufacturers are the same.” *Id.* at 3. The court then proceeded to review and summarize the relevant case law on the issue, including holdings by the Pennsylvania Supreme Court decision in *Pridgen v. Parker Hannifin Corp.*, 905 A.2d 422 (Pa. 2006), the Iowa Supreme Court holding in *Mason* and the California Court of Appeals

decision in *Burroughs*. *Id.* at 3-4. The court agreed with the reasoning articulated in those cases: “The FAA grants a type certificate to the manufacturer, and any action against a type certificate holder is really against the manufacturer.” *Id.* at 5.

To rebut this unremarkable proposition, Plaintiffs take settled case law and present a vastly distorted portrait of its meaning. For example, Plaintiffs cite to *Mason* and *Burroughs* as establishing a “two prong analysis necessary to determine ‘manufacturer’ status.” (Appellants’ Br. at 20.) Even a cursory review of *Mason* and *Burroughs*—as well as the other GARA precedent addressing the issue—however, reveals no “two prong” test. Indeed, the *Mason* court succinctly identifies the issue as: “Whether an entity that acquires the type certificate from the original manufacturer is also entitled to the protection of the statute of repose.” *Mason*, 653 N.W. 2d at 548. After reviewing the legislative history and relevant case law, the *Mason* court concluded that “[b]y acquiring the type certificate to the model 269 product line, [the defendant] stepped into the shoes of the original manufacturer and is entitled to the protection of the eighteen year statute of repose.”³ *Id.* at 549 (emphasis added).

³ The court in *Burroughs* similarly relied on the fact that the defendant “assumed the obligations and duties of the manufacturer, as well as liability for a breach of those duties, under the relevant federal law.” 93 Cal. Rptr. 2d at 132-33. Similarly, in *Burroughs*, the defendant manufacturer, Precision Airmotive Corp., acquired an aviation carburetor product line from the original manufacturer. *Id.* at 127. Plaintiffs sued Precision for injuries sustained in an accident allegedly resulting from a failure of the carburetor. *Id.* at 129. Though Precision did not manufacture the carburetor at issue, it claimed protection by GARA as the current FAA-approved Parts Manufacturer Approval holder for the carburetor line in question. *Id.* The court agreed that Precision was protected by

The analysis offered by the courts in *Mason* and *Burroughs* is also supported by the decision of the Pennsylvania Supreme Court in *Pridgen*, 905 A.2d at 422. There, the court concluded that actions taken by a type certificate holder in furtherance of its status and obligations imposed by the FARs are actions taken “in its capacity as manufacturer” under GARA. *Id.* at 435. The court thus held that the status of type certificate holder “falls under the umbrella of manufacturer conduct for purposes of GARA.” *Id.* at 436.

Despite the unanimous case law holding otherwise, Plaintiffs seek to deny Twin Commander the protections of GARA by claiming Twin Commander is not a manufacturer for purposes of the statute of repose. (Appellants’ Br. at 20-22.) In addition to simply misconstruing *Mason* and *Burroughs*, Plaintiffs rely on *Michaud v. Fairchild Aircraft Inc.*, No. Civ. 00C-06-156SCD, 2001 WL 34083885 (Del. Super. Nov. 16, 2001), in which a successor company was denied GARA’s protection by a Delaware trial court. (Appellants’ Br. at 21-22.) Plaintiff’s reliance is misplaced, however, as the *Michaud* case involved only a bankruptcy asset purchase from the original manufacturer, with no corresponding liability for products manufactured by the original manufacturer.⁴ *Id.* at 2.

GARA, reasoning that the company “was obliged to comply with [the] reporting requirements” of the FARs even though Precision did not manufacture the carburetor itself. *Id.* at 133. As explained by the Court, the entity responsible for issuing manuals and bulletins is “fulfilling *the manufacturer’s* obligations for continued airworthiness” therefore, “[i]n the eyes of the FAA, Precision was the ‘new manufacturer’ of *the carburetor.*” *Id.*

⁴ This fact was central to the court’s holding, as it noted that the successor company: “did not take over the responsibilities of the predecessor

Thus, as the case law recognizes, as the type certificate holder Twin Commander is a manufacturer for purposes of GARA.

2. This is a wrongful death action for damages arising from a general aviation aircraft accident.

For GARA's statute of repose to bar a claim, the action must be one "for damages for death or injury . . . arising out of an accident involving a general aviation aircraft," with the accident occurring more than 18 years after "the date or delivery of the aircraft to its first purchaser or lessee." GARA § 2(a).

Here, Plaintiffs seek damages for the death of the seven individuals aboard the accident aircraft. (CP 234 (Am. Compl. ¶ 29).) Plaintiffs do not dispute that the accident aircraft was a "general aviation aircraft" (*see* CP 906-939 (FAA Type certificate Data Sheet No. 2A4 Revision 46)), and that it was not at the time of the accident engaged in scheduled passenger-carrying operations (*See* CP 217 (Am. Compl. ¶ 10).) Finally, the accident occurred on May 2, 2004, almost 23 years after the original sale and delivery of the aircraft in July of 1981. (*See* CP 4402-4405; *see also* CP 217 (FAA Export Certificate of Airworthiness; Am. Compl. ¶¶ 7, 9).)

corporation; it simply acquired its assets . . . Therefore, [the successor] is not the type of entity GARA was designed to protect. Moreover, the central objective of GARA will not be materially undermined by not applying GARA protection to [successor] as [it] did not acquire the manufacturer's liabilities." *Id.* In contrast, here, Twin Commander by regulation was charged with the responsibilities for continued airworthiness previously held by the original type certificate holder that actually manufactured the accident aircraft. 14 C.F.R. § 21.3; *see also* *Mason*, 653 N.W. 2d at 548.

In sum, Plaintiffs seek wrongful death damages arising out of a general aviation aircraft accident that occurred more than 18 years after the accident aircraft was first delivered. The undisputed facts thus establish that the action is barred by GARA's 18-year statute of repose.

3. The Trial Court correctly realized that Plaintiffs' attempt to artfully plead their way around GARA's statute of repose fails as a matter of law.

GARA bars *all* claims stemming from the aircraft accident that gives rise to these actions no matter how artfully pleaded. By its terms, GARA expressly preempts state law:

This section supersedes any State law to the extent that such law permits a civil action described in subsection (a) to be brought after the applicable limitation period for such civil action established by subsection (a).

GARA § 2(d). GARA's express preemption provision applies whether the state law claim is based on products liability, negligence, breach of warranty or failure to warn. *See, e.g., Alter v. Bell Helicopter Textron, Inc.*, 944 F. Supp. 531, 538-39, 541 (S.D. Tex. 1996) (holding that GARA precludes liability under any theory); *see also Robinson v. Hartzell Propeller, Inc.*, 326 F. Supp. 2d 631, 661 (E.D. Pa. 2004) (same).

Thus, courts have refused to allow plaintiffs to circumvent GARA by recasting a time-barred product liability claim as one arising from inadequate instructions issued within 18 years of an accident. For example, in *Robinson*, the plaintiffs argued that an overhaul manual issued by the defendants within 18 years of the accident took the case outside of

GARA's bar. 326 F. Supp. 2d at 660. The *Robinson* court rejected out-of-hand such an argument, stating:

To hold that [the defendant] should be liable because its manuals issued within the period of repose did not provide an adequate means of correcting the design flaw of the critical component, would be to *circumvent the statute of repose by providing a back door to sue for the design flaw—ostensibly not for the design flaw itself, but for the failure of the manuals to adequately correct the flaw. The result would be the evisceration of the statute of repose.*

Id. at 661 (citing *Alter*, 944 F. Supp. at 539-40) (emphasis added).

Similarly, in *Alter*, plaintiffs alleged that maintenance manuals, if followed, “would not enable a mechanic to detect serious wear and tear in [the component at issue].” 944 F. Supp. at 537. The court in *Alter* rejected the argument that those facts would exempt the action from GARA's bar, instead stating that GARA's statute of repose “precludes the possibility that plaintiff could establish a cause of action under [state law] for defective marketing or failure to warn against [defendant] based on allegedly misleading inspection instructions in the maintenance manual that failed to warn or allow detection of the design flaw.” *Id.* at 541.

The same reasoning demonstrates the futility of Plaintiffs' argument here. Twin Commander issued Service Bulletin 235 as a service advisory directed to owners and operators of various aircraft calling for an inspection of the rudder tip of applicable aircraft. (CP 219-220 (Am. Compl. ¶ 16-19).) Presumably recognizing that GARA bars any claim relating to the accident aircraft itself due to its age, Plaintiffs attempt to

disguise what is, in effect, a failure to warn and design defect claim by recasting their negligence and product liability claims as ones predicated on the alleged inadequacy of the Service Bulletin 235. (*See* CP 221 (Am. Compl. ¶ 22).) According to Plaintiffs, Service Bulletin 235 should have provided *additional* instructions with regard to the inspection of the rudder or, alternatively, should have called for the replacement of the rudder system.⁵ (CP 222-234 (Am. Compl. ¶¶ 24, 28).)

Despite, however, how Plaintiffs parse the allegations in their Amended Complaint—and notwithstanding that they predicate their claims on the allegedly negligent “design” of Service Bulletin 235—Plaintiffs cannot avoid their underlying contention regarding the cause of the accident: “[t]he rudder tip and rudder assembly separated from the aircraft causing both the pilot and co-pilot to lose control of the subject aircraft and making it impossible to regain control of the subject aircraft.” (CP 218 (Am. Compl. ¶ 11).) Realizing, however, that claims based on an allegedly defective rudder and/or aircraft are plainly barred by GARA, Plaintiffs adopt a stratagem of subterfuge trying to artfully plead their way around GARA by arguing that Service Bulletin 235 constitutes a separate product, issued within 18 years of the accident, that was negligently

⁵ Specifically, Plaintiffs contend that Twin Commander was negligent in that Service Bulletin 235 required or recommended “only a one time inspection,” failed to “require or recommend a more thorough and sophisticated inspection of the rudder assembly,” and that “with the known pervasiveness of the problem,” Twin Commander was negligent for “failing to require or recommend replacement of the rudder tip cap,” *id.*, and because Service Bulletin 235 did not “adequately apprise owners of the true problem or fix.” (Appellants’ Br. at 17.)

“designed” insofar as the bulletin failed to address and remedy the allegedly defective rudder. Plaintiffs’ stratagem is fatally flawed however as Plaintiffs’ allegations, amounting to no more than a common law negligence claim, fail squarely under GARA’s preemption provision.

Indeed, the Plaintiffs are improperly attempting to create what the *Robinson* and *Alter* courts characterized as a “back door,” by trying to recover damages allegedly caused by a design flaw by “ostensibly [suing], not for the design flaw itself, but for the failure of the manuals to adequately correct the flaw.” See *Robinson*, 326 F. Supp. 23d at 661; *Alter*, 944 F. Supp. at 539-40. As those courts wisely recognized, allowing such an effort to succeed would result in the complete “evisceration” of GARA’s statute of repose. *Id.*

F. The Issuance of a Service Bulletin Does Not Implicate GARA’s Rolling Provision.

GARA provides in relevant part that a new 18-year repose period commences:

with respect to any new component, system, subassembly, or other part which replaced another component, system, subassembly, or other part originally in, or which was added to, the aircraft, and which is alleged to have caused such death, injury, or damage, after the applicable limitation period beginning on the date of completion of the replacement or addition . . .

GARA § 2(a). Thus, under GARA, in order for a new 18-year repose period to commence three separate requirements must be met: (1) the allegation must center on a “part” of the aircraft; (2) a new part must have replaced an existing part; and (3) the new part must be alleged to have

caused the accident. Plaintiffs contend that the issuance of Service Bulletin 235 implicated GARA's rolling provision and triggered a new 18-year period of repose to commence. The argument fails, however, because the Plaintiffs meet *none* of the three requirements of the rolling provision.

1. A Service Bulletin is not a "part" of an aircraft.

In a two-step argument, Plaintiffs' contend that Service Bulletin 235 constitutes a "part" of the aircraft. First, Plaintiffs argue that a service bulletin is a revision to a maintenance manual. (Appellants' Br. at 14, 29-20.) Second, Plaintiffs contend that a maintenance manual is a "part" of the aircraft. (*Id.* at 14-20.) Both of Plaintiffs' contentions are flat wrong.

First, there is no support—either in the record or in the FARs—for Plaintiffs' contention that a service bulletin is a revision to a maintenance manual. Indeed, the very bases that Plaintiffs rely on for this notion actually prove its fallacy. Plaintiffs first cite to the General Instruction section of the maintenance manual for the Twin Commander 690C aircraft, which advises: "Check the applicability of all Service Publications issued by Twin Commander." (Appellants' Br. at 19.) Plaintiffs point to this language as proof of the important role service bulletins play in the maintenance of aircraft (*see id.*), a point Twin Commander certainly does not dispute. However, if, as Plaintiffs contend, a service bulletin is a revision to a maintenance manual, it is self-evident that the manual would not then need to advise users to also review applicable service bulletins.

Further, the very FAR Plaintiffs cite for the proposition, 14 C.F.R. § 145.109, rather than supporting Plaintiffs' position, defeats it. (Appellants' Br. at 19-20.) That FAR simply lists data required to be kept by certified repair stations:

- (1) Airworthiness directives
- (2) instructions for continued airworthiness
- (3) maintenance manuals
- (4) overhaul manuals
- (5) standard practice manuals
- (6) service bulletins
- (7) other applicable data acceptable to or approved by the FAA.

14 C.F.R. § 145.109. Again, it is self-evident that if, as Plaintiffs contend, a service bulletin is a revision to a maintenance manual, there would obviously be no reason to list the two items separately in the regulation. Thus, neither the record nor the law supports Plaintiffs' contention that a service bulletin is a revision to a maintenance manual. Plaintiffs' second contention—that a maintenance manual is a “part” of the aircraft is equally flawed.⁶ Plaintiffs rely for this proposition on the Ninth Circuit's holding in *Caldwell v. Enstrom Helicopter Corp.*, 230 F.3d 1155 (9th Cir. 2000), which Plaintiffs characterize as “the highest court in the United States to decide this issue.” (Appellants' Br. at 14.) Plaintiffs' reliance on *Caldwell*, however, is wholly misplaced as the Ninth Circuit did not decide the issue of whether a service bulletin or even a maintenance

⁶ Plaintiffs go so far in this regard to even suggest, incorrectly, that a maintenance manual is assigned a part number. Plaintiffs do not, however, cite any authority for this contention and fail, tellingly, to provide the alleged “part number” for the maintenance manual in question. In fact, the most Plaintiffs could offer is a publication number of the maintenance manual.

manual, is a part of an aircraft. Rather, the issue before the *Caldwell* court centered on an aircraft's flight manual.

Plaintiffs' reliance on the inapposite *Caldwell* is even more suspect given that a Circuit Court of Appeals has, in fact, addressed the exact issue presented here, a ruling Plaintiffs fail to mention. *See Colgan Air, Inc. v. Raytheon Aircraft Co.*, 507 F.3d 270, 276-77 (4th Cir. 2007) (rejecting the argument that a maintenance manual is a "part" of an aircraft). Thus the "highest court" in the United States to consider Plaintiffs' contention has rejected it, concluding that a maintenance manual is not a "part" of an aircraft.

The *Colgan* court's analysis is instructive here. In *Colgan*, an aircraft lessee sued the aircraft's manufacturer for negligence, strict liability and breach of warranty. *Id.* at 274. In analyzing the warranty claims, the *Colgan* court examined the issue of whether a maintenance manual is a "part" of an aircraft. *Id.* at 276-77. After careful review of the case law and federal regulations, the court determined that a manual is *not* a part of an aircraft. *Id.* The court easily distinguished *Caldwell*, reasoning that "a maintenance manual is not sufficiently similar to a flight manual." *Colgan*, 507 F.3d. at 276. The *Colgan* court explained: "A flight manual is used by the pilot and is necessary to operate the aircraft, whereas a maintenance manual outline[s] procedures for the troubleshooting and repair of the aircraft for the mechanic." *Id.* (internal citations omitted). Furthermore, the court distinguished a flight manual from a maintenance manual, explaining that FAA regulations require a flight

manual be on board the aircraft—making it much more reasonable to construe such a manual as a “part” of the aircraft. *Id.* at 277. In contrast, the court explained a maintenance manual need not be on the aircraft—indeed, it can be used for multiple aircraft. *Id.* Since a maintenance manual does not need to be with an aircraft, it cannot be considered a “part” of the aircraft. *Id.*; *see also* 14 C.F.R. § 121.363(b). The Fourth Circuit, therefore, “reject[ed] the conclusion . . . that a maintenance manual is part of the aircraft as a matter of law.” *Colgan*, 507 F.3d at 277.

Plaintiffs try to buttress their argument that a maintenance manual is a “part” of an aircraft with citations to FARs, which they claim provide that “[w]ithout proper maintenance manuals, an aircraft may not be type-certified by the FAA and cannot fly” and that “[s]ervice bulletins are an integral part of the informational system used to ensure continued airworthiness of type certificated aircraft.” (Appellants’ Br. at 14.) However, none of the regulations Plaintiffs cite provide—or even imply—what Plaintiffs suggest they do. Indeed, none of the regulations cited for the proposition that an aircraft cannot be type certificated and fly without a maintenance manual even mentions maintenance manuals. (Appellants’ Br. at 14, citing 14 C.F.R. §§ 21.1, 21.11, 21.17(b), 21.24(a)(2)(iii), 21.50(b), 23.1(a), and 23.1529.) Most egregiously, perhaps, Plaintiffs rely on 14 C.F.R. § 43.13(a) for their suggestion that a maintenance manual is so integral to an aircrafts’ operation that the regulations “*require maintenance personnel to maintain aircraft using the ‘current’ manufacturer’s maintenance manual and ‘service bulletins.’*”

(Appellants' Br. at 14) (emphasis in original.) In fact, however, 14 C.F.R.

§ 43.13(a) provides simply that:

Each person performing maintenance, alteration, or preventative maintenance on an aircraft, engine, propeller, or appliance shall use the methods, techniques, and practices prescribed in the current manufacturer's maintenance manual or Instructions for Continued Airworthiness prepared by its manufacturer, *or other methods, techniques, and practices acceptable to the [FAA]* . . .

14 C.F.R. § 43.13(a) (emphasis added).

As the Fourth Circuit noted in *Colgan*, “recognizing that a maintenance manual is an *acceptable* means of compliance, it is *not the sole means* by which an operator may obtain airworthiness.” *Colgan*, 507 F.3d at 277 (emphasis added). Thus, despite what Plaintiffs would ask this Court to believe, a maintenance manual is not “essential” to maintaining an aircraft’s airworthiness under the Federal Aviation Regulations. This provides but one more reason why a maintenance manual cannot be deemed a “part” of an aircraft. *See also Carolina Indus. Products, Inc. v. Learjet, Inc.*, 189 F. Supp. 2d 1147, 1170-71 (Kan. 2001) (rejecting the plaintiffs’ contention that the issuance of a service bulletin can restart a statute of repose); *Robinson*, 326 F. Supp. 2d at 662 (holding that an overhaul manual is not a new part added to the aircraft replacing an existing component); *Lyon*, 252 F.3d at 1088 (dismissing a claim that a failure to warn about a newly perceived problem rolls the statute of repose).⁷

⁷ Additionally, the results reached in these GARA cases are consistent with pre-GARA holdings of courts interpreting state statutes of repose similar to GARA, which also reject the argument that that a maintenance or repair manual

Finally, in order for a new 18-year repose period to commence, GARA also explicitly requires that the new part replace “an existing” part. GARA ¶ 2(a). Plaintiffs have failed to establish and cannot establish that Service Bulletin 235 replaced an existing part. The Service Bulletin stands alone and replaces nothing. This failure provides an independent reason that GARA’s rolling provision is not here as a matter of law.

2. Plaintiffs’ argument also fails because as a matter of law they cannot meet the causation requirement of GARA’s rolling provision.

Section 2(a) also requires that the replacement of the part at issue “have caused such death, injury or damage” GARA ¶ 2(a); *see also Robinson*, 326 F. Supp. 2d at 662 n.5 (refusing to decide whether an overhaul manual constitutes a “part” of an aircraft because the revisions to the document could not be presumed to have caused the accident.

While Plaintiffs repeatedly state that they “have not alleged that the aircraft was defective” but rather “that the cause of this accident was the defective SB 235,” the record does not bear this out. (Appellants’ Br. at 16). Indeed, the Court need only ask one question to conclude that Service Bulletin 235 did not cause the accident at issue here: *under Plaintiffs’ theory of events that the rudder departed in flight, would this accident have occurred had Twin Commander never issued Service*

is a “separate” part or component upon which plaintiffs may base a claim to avoid a statute of repose. *See Alter*, 944 F. Supp. at 538 (citing *Schamel v. Textron-Lycoming*, 1 F.3d 655, 657 (7th Cir. 1993); *Alexander*, 952 F.2d at 1220-21; *Kochins v. Linden-Alimak, Inc.*, 799 F.2d 1128, 1135 (6th Cir. 1986); *Butchkosky v. Enstrom Helicopter Co.*, 855 F. Supp. 1251, 1257 (S.D. Fla. 1993)).

Bulletin 235? The answer being yes, Plaintiffs cannot reasonably contend—let alone prove, as GARA requires—that the issuance of the service bulletin caused the accident because the accident would have occurred regardless. In fact, Plaintiffs’ claim can only reasonably be cast as a criticism of Twin Commander *for failing to avert* this accident.

The Ninth Circuit decision in *Caldwell* aptly illustrates the deficiency in Plaintiffs’ causation argument. In *Caldwell*, a helicopter crashed when it ran out of fuel. *Caldwell*, 230 F.3d at 1156. The pilot was apparently unaware that the last two gallons of gasoline in the fuel tanks could not be used. *Id.* The plaintiffs in *Caldwell* contended that the helicopter’s flight manual had allegedly been revised *to delete a warning* about the amount of usable fuel in the aircraft. *Id.* Plaintiffs thus argued that the revised flight manual was a new part that was defective, rather than the helicopter, and that it replaced an old manual that contained an adequate fuel warning. For a variety of reasons inapplicable here the *Caldwell* court accepted the argument that an aircraft manual is an integral part of the general aviation aircraft product that a manufacturer sells.” *Id.* at 1157. The court, however, carefully limited the scope of its holding, explaining that a revision to flight manual “does not implicate GARA’s rolling provision [] unless the *revised part* ‘is alleged to have caused [the] death, injury, or damage.’” *Id.* at 1158 (emphasis added). The court went on to state that only if the defendant “substantially altered, or deleted, a warning about the fuel system from the manual within the last 18 years . . . and the revision or omission is the proximate cause of the accident,”

would the plaintiffs' action fall outside the scope of GARA's protections." *Id.* (emphasis added). The *Caldwell* court thus allowed plaintiffs' lawsuit to proceed because it was the deletion of the fuel tank warning from the manual—in violation of a FAR, no less—that was alleged to have caused the accident. *Id.* at 1156. Indeed, the *Caldwell* plaintiffs stressed that no defect in the helicopter caused the accident, conceding instead “that the fuel tanks themselves were in good working order.” (*Id.*)

The facts and allegations in this case contrast sharply with those of *Caldwell* because the Service Bulletin here can reasonably be argued to have caused the accident since, according to Plaintiffs' own contentions, the accident would have occurred even if Twin Commander had never issued Service Bulletin 235. (Appellants' Br. at 17.)

A careful review of Plaintiffs' pleadings reveals that this causation allegation is conceded. Plaintiffs explicitly allege: [T]he rudder tip and rudder assembly separated from the aircraft causing both the pilot and copilot to lose control of the subject aircraft and making it impossible to regain control of the subject aircraft.” (CP 218 (Am. Compl. ¶ 11).) Plaintiffs thus complain that Service Bulletin 235 did not “adequately apprise[d] owners of the *true problem or fix*” and, instead, “provided for a one time inspection that was inadequate to *detect the problem.*” (See Appellants' Br. at 17; CP 996 (Pls.' Resp. to Mot. for Summ. J. at 17).)

Finally, the ramifications of allowing a plaintiff to circumvent GARA's protections by claiming that the issuance of a service bulletin restarts GARA's 18-year statute of repose would result in more than just

an evisceration of the statute's protections, and undermine GARA's objectives in their entirety. Giving credence to such an argument would also establish a perverse incentive system discouraging type certificate holders from issuing service bulletins to alert owners and operators of safety issues because to do so would necessarily mean restarting or extending the period of repose on aviation products. In other words, Twin Commander—and all type certificate holders—would be in a far better legal position with regards to liability if they simply stopped issuing service bulletins for aircraft manufactured and first delivered more than 18 years ago. Such a perverse result is antithetical to Congress's intent in enacting GARA and cannot be seriously considered.

G. Plaintiffs Have Failed to Offer Any Evidence Demonstrating That Twin Commander Knowingly Misrepresented or Withheld Required Material Information to the FAA.

1. Courts require plaintiffs seeking to invoke GARA's fraud exception to present specific facts of misrepresentations or concealment, not negligence.

GARA's statute of repose does not apply if manufacturers materially and intentionally mislead the FAA:

[I]f the claimant pleads with specificity the facts necessary to prove, and proves, that the manufacturer with respect to a type certificate or airworthiness certificate for, or obligations with respect to continuing airworthiness of, an aircraft or a component, system, subassembly, or other part of an aircraft knowingly misrepresented to the Federal Aviation Administration or concealed or withheld from the Federal Aviation Administration, required information that is material and relevant to the performance or the maintenance or operation of such aircraft, or the component, system, subassembly, or other part,

that is causally related to the harm which the claimant allegedly suffered[.]

GARA § 2(b) (GARA's "fraud exception") (emphasis added). Even in the face of the explicit statutory language and case law requiring "the claimant" to "plead[] with specificity the facts necessary to prove, and prove" the misrepresentation, Plaintiffs nonetheless advise the Court that the burden rests on Twin Commander to prove it did not knowingly misrepresent information to the FAA. (Appellants' Br. at 23.) As discussed previously, Plaintiffs' interpretation cannot be reconciled with the statute's explicit language and well-established summary judgment standards, which require the nonmoving party to "make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp.*, 477 U.S. at 322.

Here, the burden here rests with Plaintiffs to proffer evidence sufficient to prove each of the elements of the foregoing fraud exception. *See, e.g., Robinson*, 326 F. Supp. 2d at 647. Specifically, plaintiffs seeking to exploit the fraud exception must offer evidence of: (1) defendant's knowledge; (2) a misrepresentation, concealment, or withholding; (3) of certain information required to be reported to the FAA; (4) the materiality and relevance of the information; and (5) a causal relationship between the information and the accident. *See, e.g., Rickert v. Mitsubishi Heavy Indus., LTD.*, 923 F. Supp. 1453, 1456 (D. Wyo. 1996). Intentionality is required regardless of whether the claim is based on a misrepresentation, concealment, or withholding of information. *See*

Sheesley v. Cessna Aircraft Co., No. 02-4185-KES, 2006 WL 1084103, at *8 (D.S.D. Apr. 20, 2006); *Hinkle v. Cessna Aircraft Co.*, No. 247099, 2004 WL 2413768, at *12 (Mich. Ct. App. Oct. 28, 2004).

While only a handful of cases have addressed GARA's fraud exception and the specific burden it places on plaintiffs invoking its exception, those cases are illustrative here. Most recently, in *Sheesley*, the court rejected plaintiffs' attempt to invoke the fraud exception because plaintiffs failed to "point to any specific false statements by Cessna to the FAA." 2006 WL 1084103, at *9. While *Sheesley* plaintiffs provided a detailed history of the problems associated with the component in question, and found fault with how the manufacturer of the aircraft had addressed the problems, the court held that this evidence was only "probative on whether Cessna's design was defective," but did "not indicate that Cessna made a misrepresentation to the FAA." *Id.*

Likewise, the Eastern District of Michigan has also addressed GARA's fraud exception in *Cartman v. Textron Lycoming Reciprocating Engine Div.*, No. 94-CV-72582-DT, 1996 WL 316575 (E.D. Mich. Feb. 27, 1996). There, the court also held that the plaintiff failed to satisfy the "very particular requirements" of the fraud exception. *Id.* at *3. The court stated that the "language of the provision indicates that the period of limitations is not waived merely because a defendant has not informed the FAA about either possible safety concerns regarding a part or possible misrepresentations by other parties." *Id.* In short, the *Cartman* court

required specific and concrete proof from the plaintiffs of the defendant's knowing misrepresentation to the FAA. *Id.*

Perhaps most illustrative of the fraud exception's requirements are two decisions out of the U.S. District Court of Wyoming involving the same action, *Rickert*, 923 F. Supp. 1453 (*Rickert I*) and *Rickert v. Mitsubishi Heavy Indus., LTD.*, 929 F. Supp. 380 (D. Wyo. 1996) (*Rickert II*). There, the estate of the deceased pilot brought a products liability action against the aircraft manufacturer. *Rickert I*, 923 F. Supp. at 1454. The defendant, Mitsubishi, moved for summary judgment based on GARA's statute of repose, and the dispositive issue in resolving the motion was whether GARA's fraud exception applied. *Id.* at 1456-57. Plaintiff in *Rickert I* relied on two types of evidence to try and establish the fraud exception: (1) expert reports and (2) internal Mitsubishi letters. *Id.* at 1457.

Specifically, the plaintiffs' expert in *Rickert I* opined at length regarding Mitsubishi's deficiencies in designing and testing the aircraft. *Id.* at 1457. But, as the court realized, the expert "failed to identify 'specifically' any misrepresentation." *Id.* The court went on to state, [*iff this Court were to accept [the expert's] apparent definition of what constitutes a 'misrepresentation,' then it would have to conclude that all differences of opinion and mistakes amount to misrepresentation.*] *Id.* at 1458. (emphasis added). The court similarly concluded that the internal Mitsubishi letters in which the general counsel of a subsidiary castigated the company for being more concerned about lawsuits than aircraft safety

were also insufficient. *Id.* at 1461. The court held that even accepting the statements in the letters as true and drawing the most negative inferences possible, the letters showed only that in designing the aircraft Mitsubishi had been “obstinate, short-sighted, negligent, and perhaps reckless,” which the court ruled “does not mean that Mitsubishi knowingly misrepresented anything to, or concealed anything from, the FAA.” *Id.* at 1461-62.

In short, the *Rickert I*, the court concluded that a plaintiff cannot “avoid GARA’s period of repose simply by dressing up her evidence (most of which would be relevant to and probative of the issues of negligence and strict liability) as ‘misrepresentations’ and ‘concealments.’ *GARA requires more than innuendo and inference; it demands ‘specificity.’*” *Id.* at 1462 (emphasis added).

Two months later, the plaintiff moved for reconsideration of the court’s earlier ruling and presented new evidence to the court for its consideration. *Rickert II*, 929 F. Supp. at 381. The court’s subsequent opinion confirms the exacting standards of GARA’s fraud exception. The plaintiff presented affidavits from two former Mitsubishi employees that specifically stated that Mitsubishi had knowingly withheld information from the FAA that it was required to provide. *Id.* at 382. Only after offering this direct evidence of the defendant’s knowing misrepresentation and concealment did the court agree that GARA’s fraud exception prevented summary judgment. *Id.* at 383.

As the foregoing cases illustrate, to gain the benefit of GARA fraud exception, a plaintiff must offer *specific proof* of a defendant’s

knowing misrepresentation to the FAA of information required to be reported to the FAA, which is material, relevant, and causally linked to the damages incurred. A plaintiff who simply puts forward expert testimony in which those experts disagree with a defendant's design, testing, or certification decisions or disagrees with a defendant's diagnosis of a problem, does not meet the heavy burden of the fraud exception. *See, e.g., Rickert I*, 923 F. Supp. at 1457-58. Instead, courts have held that while such evidence may bear on questions of the defendant's liability under theories of negligence or strict liability, the evidence is irrelevant to the issue of a knowing misrepresentation. *Id.* at 1462.

As will be discussed below, the allegations in Plaintiffs' complaint, the opinions of Plaintiffs' experts, and the arguments presented to the Court here, fit almost exactly into the mold of *Rickert I* in which the court granted the defendant's motion for summary judgment under GARA. Further, Plaintiffs' failure to produce for the Court any actual evidence of a knowing misrepresentation of required information by Twin Commander to the FAA is fatal to their attempt to invoke the fraud exception.

2. 14 C.F.R. § 21.3 includes specific exceptions to its reporting requirements that are applicable here.

In an effort to avoid GARA's statute of repose, Plaintiffs rely on and quote 14 C.F.R. § 21.3 for the proposition that Twin Commander had statutory reporting requirements to the FAA, which it failed to meet.⁸

⁸ Plaintiffs ignore other aspects of the reporting requirements, including the fact that a manufacturer is only required to report on products manufactured by it, and only if the manufacturer also *determines* itself that the incident was

(Appellants' Br. at 26.) Section 21.3 requires a type certificate holder to report certain information to the FAA if: (1) there has been a failure, malfunction or defect; (2) in a product or part manufactured by the type certificate holder; and (3) the type certificate holder has determined that the failure, malfunction or defect resulted in, or could result in, one or more of 13 specified occurrences.⁹ See 14 C.F.R. § 21.3(a).

Critically and inexcusably, however, Plaintiffs omit a key section of the regulation that is vital to any analysis as to whether a type certificate holder had a reporting requirement under this regulation. Section 21.3 begins: "*Except as provided in paragraph (d) of this section . . .*" *Id.* (emphasis added). The exceptions in paragraph (d) of § 21.3, which Plaintiffs simply ignore, provides:

The requirements of paragraph (a) of this section do not apply to –

(1) Failures, malfunctions, or defects that the holder of a Type Certificate (including a Supplemental Type Certificate) . . .

(i) Determines were caused by improper maintenance, or improper usage;

caused by the product defect. See 14 C.F.R. § 21.3; see also *Cartman*, 1996 WL 316575, at *3.

⁹ The 13 occurrences are: (1) fires; (2) engine exhaust system failures; (3) accumulations or circulation of toxic or noxious gases in the crew or passenger compartments; (4) malfunctions of a propeller control system; (5) propeller or rotorcraft hub or blade structural failures; (6) flammable fluid leakage; (7) brake system failures; (8) significant aircraft primary structural defects; (9) abnormal vibration or buffeting caused by structural or system malfunctions; (10) engine failures; (11) structural or flight control system malfunctions; (12) complete losses of more than one electrical power generating system or hydraulic power system; or (13) failures of more than one attitude, airspeed, or altitude instrument. 14 C.F.R. § 21.3(c).

- (ii) Knows were reported to the FAA by another person under the Federal Aviation Regulations; or
- (iii) Has already reported under the accident reporting provisions of Part 430 of the regulations of the National Transportation Safety Board.

Thus, Twin Commander has no duty to report to the FAA failures, malfunctions, or defects that the company knows were already reported to the FAA or that were reported to the NTSB following an accident or that the manufacturer believe were caused by improper usage. *Id.* Thus, despite how Plaintiffs characterize the reporting requirements of 14 C.F.R. § 21.3 as absolute, the obligations are in fact contingent.

Most importantly, Plaintiffs here fail to establish that Twin Commander had a reporting obligation under § 21.3 with regard to any of the seven incidents/accidents Plaintiffs discuss in their brief. For example, Plaintiffs make no effort to establish that the incidents/accidents had not been reported to the FAA or NTSB. In fact, as discussed in detail below, the undisputed facts in the record establish that each of the incidents relied on by Plaintiffs purportedly in support of invoking GARA's fraud exception were reported to the NTSB and FAA. In fact, the NTSB and FAA investigated and issued reports related to each one of these accidents, and Twin Commander worked directly with the NTSB and FAA during the official government investigations of these incidents/accidents. *See* (CP 1175-1180 (Decl. of Pierre DeBruge).)

Thus, unlike the plaintiff in *Rickert II*, who offered affidavits from former employees of Mitsubishi stating that the defendant had knowingly

withheld required information from the FAA, Plaintiffs have offered no testimony, for example from an employee of the FAA or Twin Commander, nor any document from the over 20,000 produced by Twin Commander in this litigation that suggests—let alone proves—a knowing misrepresentation of required information.

3. Plaintiffs' submissions proffered purportedly to establish the fraud exception bear exclusively on issues of negligence and thus are irrelevant to the issue of a knowing misrepresentation.

As the courts have cautioned, it is precisely because the question of negligence is irrelevant to the GARA inquiry that a court must be wary of a plaintiff's effort to offer evidence in support of an accusation of a knowing misrepresentation that bears instead only on a defendant's negligence. *See, e.g., Rickert I*, 923 F. Supp. at 1457-62. In *Rickert I*, the court carefully observed that expert opinions that were critical of the defendant's design, testing, and certification decisions were irrelevant to analyzing the applicability of the fraud exception *unless a specific misrepresentation is identified*. *Id.* at 1457. The court explained that neither "differences of opinion" between experts and defendants, nor design, testing, or certification "errors" by a defendant amount to a misrepresentation. *Id.* at 1458.

Twin Commander's motion for summary judgment did not require a determination of what caused the accident in question but rather assumed for the purposes of the motion that the accident occurred as Plaintiffs allege: the rudder on the accident aircraft separated during flight.

In response, however, Plaintiffs try to invoke the fraud exception in the same erroneous manner as the court warned against in *Rickert I*.

Deconstructed, Plaintiffs' argument is straightforward and the error in their logic self-evident. According to Plaintiffs: (1) the true cause of some earlier aircraft incidents was "rudder flutter"; (2) Twin Commander's conclusion that the cause of the earlier incidents was something other than "rudder flutter" was incorrect; (3) and thus Twin Commander necessarily "knowingly misrepresented" information to the FAA because it failed to correctly identify the actual problem as "rudder flutter." In other words, Plaintiffs unapologetically contend that a disagreement over the causes of other aircraft incidents equates to a "knowing misrepresentation" to the FAA of required information. Plaintiffs' position is untenable as a matter of law.

In support of their invocation of GARA's fraud exception, Plaintiffs submit only declarations from four outside experts. None of these expert declarations, however, provide evidence to support the conclusion Twin Commander made a knowing misrepresentation to the FAA. To the contrary, the apparent purpose of each of the declarations of Mark Hood, Robert Donham, Donald Sommer, and William Twa is to take exception with the adequacy of Service Bulletin 235. For example, Hood states that after reviewing *three* documents—Service Bulletin 235 and two NTSB reports regarding different accidents—he concluded:

[a]n inspection for cracking as identified and described in Twin Commander Alert Service Bulletin 235 is typically for detection of fatigue

cracking which is progressive in nature . . . Alert Service Bulletin 235 makes no such provisions for structural modification to prevent future crack initiation and propagation, and therefore a one-time inspection is inadequate to prevent future failure of the rudder tip attendant structure.

(CP 713-714 (Decl. of Mark Hood ¶ 11).) Plaintiffs' experts Sommer and Donham take similar approaches as Hood. Sommer, for instance, states:

“Due to the severe consequences of the nature and the frequency of structural defects being found, which were caused by flight flutter according to Robert Donham, one of Plaintiffs' experts, the one-time visual inspection required by Service Bulletin 235 is grossly inadequate.”

(CP 677 (Decl. of Donald Sommer ¶ 9).) Donham's declarations also deal almost exclusively with his conclusions as to the cause of the accident in question, his beliefs regarding the causes of the previous incidents involving similar aircraft, and his beliefs that the original testing of this model aircraft was inadequate and thus the aircraft is wrongfully certified as airworthy. (*See generally* CP 674; 1010-1038; 1126-1144 (Decl. of Robert Donham; Supp. Decl. of Robert Donham).) Faulting the adequacy of Service Bulletin 235, however, has no bearing on determining the applicability of GARA's fraud exception. Thus, while Sommer's and Donham's declarations contain opinions that, if admissible and believed by a jury, could bear on a negligence claim, they are wholly irrelevant to determining whether Twin Commander intentionally misrepresented or failed to advise the FAA of required information.

Courts have rejected very similar expert affidavits that are offered in support of invocation of GARA's fraud exception. For example, in

Bianco v. Cessna Aircraft Co., No. 1CA-CV 03-0647, 2004 WL 3185847, at *6 (Ariz. Ct. App. 2004), the court refused to give credence to affidavits from two expert witnesses because the affidavits “consist of inadmissible conclusions and attacks upon [Cessna’s] veracity” and “contain no reference to any statement or submission by [Cessna] to the FAA that was material, relevant, required, and knowingly false.” The court referred to a statement to an affidavit from Mr. Sommer, the same expert relied on by Plaintiffs here, but refused to give it any credence because:

This statement cites no documents withheld or concealed from the FAA, relies upon what a party “had to have known” at a time far removed. It therefore violates Rule 56(e), which prohibits the use of conclusory allegations in an affidavit to replace the conclusory allegations of a complaint or answer. . . . Conclusory affidavits, even from an expert witness, will not allow a party to avoid summary judgment.

Id. Plaintiff’s reliance on expert declarations that fail entirely to provide specific instances of a knowing misrepresentation, concealment, or withholding, but rather speak only to the issue of negligence, is puzzling given the explicit statutory language of § 2(b). As recognized by the trial court, Plaintiffs’ effort fails as a matter of law.

4. Plaintiffs blatantly misrepresent certain facts in an effort to create the impression that Twin Commander knowingly withheld information from the FAA.

Plaintiffs cite a Model 690 prototype accident in 1970, flutter and vibration testing and analysis from 1979, and seven accidents involving Model 690 aircraft in the hopes of persuading the Court that Twin Commander knowingly misrepresented or withheld required information

from the FAA. A review of the record cited, however, reveals Plaintiff's efforts are for naught.

a. 1970 Model 690 Prototype accident.

First, Plaintiffs suggest that the manufacturer never reported a 1970 accident involving one of the first prototypes of the 690 model aircraft. (Appellants' Br. at 28.) In truth, however, the incident was reported to the FAA, as catalogued in the FAA's own accident and incident database. Indeed, presumably it was the manufacturer conducting the test that reported the accident but, regardless, since it was reported to the FAA no other entity had a reporting duty under the only applicable FAR, 14 C.F.R. § 21.3. (CP 1188 (NTSB report relating to Model 690 Prototype accident in Bethany, Oklahoma on June 26, 1970).)

Furthermore, in the very testing and analysis that Plaintiffs' own expert acknowledges was performed in order to certify the aircraft (*see* CP 1129-1130 (Supp. Decl. of Robert Donham ¶ 4)), the aircraft manufacturer (Rockwell International) included the investigation report from the 1970 accident, which concluded that "rudder flutter" was the likely cause. In other words, the manufacturer disclosed to the FAA the accident and its likely cause while certifying the aircraft. This report brings up another key fact that Plaintiffs ignore: as a result of the 1970 prototype accident, the manufacturer undertook an "intensive investigation into the rudder flutter characteristics," and thereafter redesigned tab configuration to ensure "satisfactory flutter characteristics." (CP 1190-1326 (Engineering Research Associates's Report, dated September 1970).)

Thus, the record establishes that original manufacturer was duly concerned about the 1970 prototype accident and took affirmative steps to address a recognized rudder problem. Accordingly, Plaintiffs' effort to paint the testing and certification process as a devious scheme to avoid FAA requirements or mislead the FAA is baseless, and is entirely rejected by the record.

b. The 1979 flutter and vibration testing and analysis.

The Plaintiffs also reference flutter and vibration analyses and tests from 1979 which they argue demonstrates misrepresentations to the FAA that the flutter and vibration testing, required by CAR §§ 3.159 and 3.311, had been properly performed when it had not. (Appellants' Br. at 28.) In doing so, Plaintiffs, however, mischaracterize the declaration testimony of their very own expert, Robert Donham. While it is true that Plaintiffs expert takes issue with the vibration analysis conducted in 1979 for the Model 690C, Donham's complaint is only that the manufacturer in 1979 should have conducted a new flutter analysis *of the control surface tabs* because other aspects of the rudder had been redesigned since the Model 690's earlier certification. (CP 1130-1131 (Supp. Decl. of Robert Donham ¶ 5)) (emphasis added).

While it is unclear on what Donham bases his interpretation that CAR §§ 3.159 and 3.311 require a manufacturer to retest components that have already been certified as free from flutter when a modification is made to other components, that issue is irrelevant to the issues before the

Court here. What is important is that the testing and analysis report—cited by Plaintiffs—and included as part of the FAA certification process—unequivocally establishes that the manufacturer accurately informed the FAA that the flutter and vibration “analysis did not include the control surface tabs since no design or operational changes were made to these systems and the previous substantiating data was still applicable.” *Id.* Thus, it is indisputable that the manufacturer *never misled the FAA about the scope and extent of testing and analysis that had been done.* To the contrary, the manufacturer advised the FAA quite unambiguously that it did not conduct testing of the control surface tabs, the same testing that Donham believes was required. Thus, putting aside whether Donham is correct, the important point is that the manufacturer never misrepresented nor concealed information about the testing from the FAA.¹⁰

¹⁰ Plaintiffs acknowledged at oral argument that Plaintiffs’ argument that the original manufacturer made a knowing misrepresentation to the FAA with regard to the certification of Models 690 and 690C aircraft prevails only if the court accepts Plaintiffs’ argument that a manufacturer operating under a Delegation Option Authorization (“DOA”), that provides information to an individual serving as a Designated Engineering Representative (“DER”) of the FAA does not satisfy the manufacturer’s obligation to provide information to the FAA. (See Tr. of Hearing on Mot. Summ. J., Apr. 27, 2007, at 52:11-25.) Plaintiffs’ theory is untenable as it directly contradicts the regulatory procedures established by the FAA for certification, as well as federal law’s view of the role of manufacturers operating under DOA or DER authority. The trial court requested additional briefing on the issue of whether a manufacturer operating under a DOA or an individual serving as a DER is tantamount to the FAA for reporting purposes. (See Tr. of Hearing on Mot. Summ. J., Apr. 27, 2007, at 72:12-73:4.) Twin Commander filed a brief (see CP 5269-5281) showing that the FAA is the sole administrative body that may issue type certificates and production certificates, and that the FAA will only grant a type certificate if it finds that the manufacturer has submitted all requisite testing and information to the FAA for review. See 49 U.S.C. §§ 1423, 44702(a); see also *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797,

c. The 1982 Arkansas accident.

Plaintiffs' also reference a 1982 accident in Arkansas in an effort to prove the applicability of GARA's fraud exception. According to the official NTSB investigation, the 1982 accident was caused by overload of the wing and spar, causing the left wing to depart the aircraft in flight, as a result of the pilot exceeding the aircraft design limits. *See* (CP 1340-1346 (NTSB Factual and Probable Cause Reports).)¹¹ The corresponding in-

805-06 (1984). In addition, FAA regulations and orders demonstrate the agency's conclusion that a company or individual operating as a DOA or DER is the FAA for purposes of certain FAA compliance. *See* 49 U.S.C. § 44702; 14 C.F.R. §§ 183.41, 183.45, 183.49; FAA Orders 8100.9A, 8110.37D. For similar reasons, federal courts treat FAA designated representatives as "federal officers" for purposes of the federal officer removal statute, 28 U.S.C. § 1442(a)(1). *See, e.g., Magnin v. Teledyne Cont'l Motors*, 91 F.3d 1424, 1427-28 (11th Cir. 1996); *AIG Europe (UK) LTD. v. McDonnell Douglas Corp.*, No. CV 02-8703-GAF, 2003 WL 257702, at *2 (C.D. Cal. Jan. 28, 2003). Finally, Plaintiffs themselves acknowledge that for purposes of certification, a DOA holder and a DER are the FAA. (*See* CP 693; 1095; 1099 (Decl. of William Twa ¶ 7; Pls.' Resp. to Mot. for Summ. J. at 8, 12).) Notwithstanding, however, the question is largely academic to the issue here because it is the FAA that has determined that the best process by which to ensure compliance with its certification regulations is through the DOA system. *See Varig Airlines*, 467 U.S. at 805-07. Plaintiffs must therefore show that the manufacturer did not comply with these FAA procedures, amounting to an intentionally misrepresentation or omission of material information that is required by law to be provided to the FAA. If the FAA does not require a manufacturer to submit that information to it directly, and has instead established procedures under DOA and DER for authorizations, then a failure to provide that information directly to the FAA cannot serve as a means for Plaintiffs to invoke GARA's fraud exception as a matter of law.

¹¹ Plaintiffs take issue with Twin Commander's citation to NTSB probable cause reports relating to the post-accidents referenced by Plaintiffs (Appellants' Br. at 49). Plaintiffs cite 49 U.S.C. § 1154 as "prohibit[ing] use of any part of NTSB reports, factual and "probable cause" reports alike, in any legal proceeding in all jurisdictions in the United States." (*Id.*) Plaintiffs' complaint is not well taken. In fact, 49 U.S.C. § 1154(b) states: "No part of a report of the Board, related to the accident or an investigation only that of an accident, may be admitted into evidence or used in a civil action for damages *resulting from a matter mentioned in the report.*" (emphasis added). Twin Commander's citation to NTSB probable cause reports for past accidents is not covered by this

flight breakup of the aircraft resulted in numerous structures of the aircraft departing the aircraft, with wreckage dispersed over a three-mile radius from the impact cite. *Id.* While portions of the left wing were found more than three miles from the impact site, the “complete rudder, with the trim tab attached, was found in the main wreckage.” *Id.* The rudder tab balance weight was also found near the rudder. *Id.* Nonetheless, Plaintiffs reference this accident and include as an exhibit to their brief the entire 300+ page accident investigation report, apparently because on one of those 300+ pages there is a single reference to the fact the rudder horn was not located. *Id.* Notably, the NTSB found no significance to this fact.

Likewise, Plaintiffs unbelievably represent to the Court that the fact that the rudder horn was not located in the three miles of wreckage dispersion in the 1982 Arkansas, makes the latter accident “suspiciously similar” to accidents that occurred in Texas and Georgia. (*See Appellants’ Br. at 29.*) In fact, as is outlined below in the description of the Texas and Georgia accident/incident, Plaintiffs’ position is without evidentiary support. More importantly, Plaintiffs’ bottom line contention regarding the Arkansas accident, that “This event and similarity was never reported to the FAA by Twin Commander at any time” (*id.* at 30) is equally unsustainable. In fact, both the NTSB and FAA had undisputed notice of the lack of the rudder horn in the wreckage of the 1982 Arkansas accident, a fact made clear by the very NTSB Airworthiness Group Chairman’s

prohibition, as the civil action at issue does not result from a matter mentioned in the report.

Report of Investigation—a group that included representatives of both the NTSB and the FAA—that Plaintiffs cite. *See* (CP 2969-3296 (NTSB Airworthiness Group Chairman’s Report of Investigation).) Twin Commander has no duty to report an accident already reported to the FAA or the NTSB. *See* 14 C.F.R. § 21.3. Finally, the evidence submitted related to this two-decade old accident has absolutely no probative value whatsoever toward Plaintiffs’ obligation to proffer affirmative evidence of either (1) a knowing misrepresentation or omission of (2) information required to be reported to the FAA.

d. The 1992 Denver accident and “Four Known Cases” of rudder breakup.

Plaintiffs’ looseness with the record is also apparent in its discussion of a 1992 accident in Denver, Colorado. Plaintiffs cite expansively to the NTSB’s accident investigation file for this accident (an exhibit consisting of several hundred pages) to support their unsubstantiated allegation that the rudder on the aircraft involved in that Denver accident failed in flight causing a “catastrophic” crash. (Appellants’ Br. at 30-31.) Nothing, however, in that report supports Plaintiffs’ contention that the rudder was the cause of Denver accident. To the contrary, the NTSB’s probable cause determination rejects Plaintiffs unsubstantiated contention. (CP 1335 (NTSB Probable Cause Report) (stating that the probable cause of the accident was “the pilot flying the aircraft beyond the design maneuvering speed and exceeding the design stress limits. A factor was clear air turbulence”).)

Further, in concluding that the probable cause of the accident was severe turbulence, the NTSB conducted metallurgical examinations on the numerous structures on the aircraft that had failed, including the rudder which had broken into three recovered pieces. The NTSB metallurgical exam revealed that the failures were a result of overload, in other words they occurred as a result of the aircraft exceeding its design limits after encountering the turbulence (*see id.*). Thus, Plaintiffs' unsubstantiated allegation that Twin Commander concealed or withheld from the FAA testing that revealed that the rudder failed above the design load (Appellants' Br. at 30-31) is pure fiction, as the record establishes that the government had that information. Moreover, the NTSB's investigation conclusions demonstrates that Twin Commander had no additional reporting requirements related to this accident, as 14 C.F.R. § 21.3 excepts from its reporting provisions accidents believed to be caused by improper usage, which would include exceeding an aircraft's design limits, and any accident already reported to the NTSB and FAA.

Plaintiffs further contend without any supporting evidence that during this investigation Twin Commander withheld from the FAA the fact that there were "four known cases . . . of the [rudder] horn departing the rudder." (*Id.* at 31.) However, the very document cited by Plaintiffs proves that the opposite is true: FAA and NTSB were well-aware of these four other incidents where the horn had departed the rudder; and that same documents establishes that the NTSB and FAA also recognized that the departure of the horn in flight may have been a result of secondary

damage, rather than a precipitating event of these four accidents—an early observation that their subsequent metallurgical exam confirmed. (*See* CP 1337-1338 (FAA Investigator Gabrys’ Trip Report dated April 26, 1993) (reporting on April 21, 1993 wreckage exam and meeting, attended by representatives of NTSB, FAA, and Twin Commander).) As these documents also unquestionably demonstrate, Twin Commander worked closely and diligently with the NTSB and FAA in their joint effort to determine the cause of this Denver accident, and the FAA and NTSB were fully informed regarding the very information that Plaintiffs contend was “concealed” from them.

e. 2002 Texas incident and 2003 Georgia accident.

Finally, Plaintiffs rely on the two incidents referenced in Service Bulletin 235. Neither incident, however, supports Plaintiffs’ allegation of a knowing misrepresentation or an intentional concealment from the FAA. To the contrary, the undisputed record cited by Plaintiffs establishes that, in light of a 2002 Texas incident where a pilot learned after landing his aircraft that part of the fiberglass rudder had departed in flight for an undetermined reason, and after a March 27, 2003 Georgia accident where it was determined the rudder cap also departed the aircraft for an unknown reason, Twin Commander took immediate decisive action to ensure that, in the event the two incidents evidenced a problem with the rudder, any potential problem was proactively addressed. Out of prudence, the record shows, Twin Commander wanted to ensure that, if there were any inherent problems with the rudders on the rest of the fleet, they would be identified

and remedied as quickly as possible. (CP 4374-4376 (S.B. 235 Inspection—The Story Behind the Story).)

Thus the record establishes that Twin Command took immediate steps in the days after the Georgia accident—long before the cause of the Georgia accident was known and before a determination of why the rudder cap had departed that aircraft—to gather information regarding the conditions of the rudders on the rest of the fleet, to circulate information regarding what was known about the two incidents, and to immediately start the process of issuing a service bulletin requiring a fleet-wide inspection of all rudders, and replacement where and if needed. (*See* 1175-1178; 3756-3928 (Decl. of Pierre DeBruge; Twin Commander Records documenting development of Service Bulletin 235).) The record also establishes that during the process, Twin Commander worked intimately with representatives of the FAA. (*See id.*) Within a week of the accident, Twin Commander had collected information from visual inspections of other rudders, and had drafted a service bulletin requiring a detailed inspection of all rudders on the fleet by an Airframe and Powerplant mechanic, whether fiberglass or aluminum, and to provide for how rudders that were of concern should be replaced. (*See id.*) Service Bulletin 235 was thereafter submitted to and approved by the FAA within Service Bulletin 235, *within three weeks* of the Georgia accident. (CP 1175-1178 (Decl. of Pierre DeBruge).) During this time Twin Commander also performed the engineering necessary to accomplish the retrofit, for both fiberglass and aluminum rudders, modified the respective

engineering drawings, submitted them to the FAA for approval, and began finding vendors who could supply new rudders for those that failed the inspection. (*See* CP 3756-3928.) Further, Twin Commander also designed a method of monitoring compliance with the service bulletin. (*See id.*) With all of this occurring within a four-week period, the Plaintiffs still expect the Court to accept their argument that issuance of this bulletin somehow supports Plaintiffs' contention that Twin Commander knowingly misrepresent, conceal, or withhold information from the FAA. The contention—which must be labeled a contention since there is no evidence supporting it—is absurd.

The record is also clear that the steps taken by Twin Commander were preventative, proactive, and without any knowledge regarding whether either the Georgia or Texas incidents were in fact caused by a rudder problem. (CP 4356-4357 (Email from Jeff Cousins to service centers, dated Apr. 4, 2003) (“Currently an analysis is being done by the NTSB on the two current incidents rudders . . . but we do not have any information yet to determine cause”).) Nonetheless, Twin Commander went forward and issued the service bulletin with the FAA's approval out of a “sense of responsibility . . . despite not knowing the cause of the two accidents.” (CP 4374-4376 (S.B. 235 Inspection—The Story Behind the Story)). Ironically, the FAA ultimately concluded that the Georgia accident was caused, not by a rudder problem, but rather by “[a]n in-flight encounter with unforecasted severe turbulence in cruise flight resulting in

the design limits of the airplane being exceeded due to an overload failure of the airframe . . .” CP 1361 (NTSB Probable Cause Report).

Lastly, while Plaintiffs miscite and mischaracterize the record regarding the Twin Commander’s knowledge during this three week period, the record speaks for itself. For example, Plaintiffs seek to place talismanic significance on a one-page email by repeatedly citing to parts of it selectively, over and over again, to argue that Twin Commander believed the Georgia, Texas, and Denver accidents were “identical” and the “same,” but withheld this determination from the FAA. A review of the complete email, however, rejects such a strained and misleading interpretation. Instead, the email is unambiguous: within a week of the accident, Twin Commander proposed an immediate fleet-wide inspection of all rudders, and replacement where necessary. (CP 4356-4357 (Email from Jeff Cousins).) Twin Commander advised that it was taking these steps even though the cause of the rudders departing from the aircraft was, at that point, unknown, and despite the fact that in one instance at least the rudder failure was known to have occurred well above design limits. Nonetheless, Twin Commander explained to its service centers that while the cause of the three rudder incidents was still unknown, there was “tearing of the rudder” in the Denver incident “identical” to the Texas and Georgia incident/accident, and it has “the same appearance.” *Id.* Accordingly, “to be prudent” and “to obtain more information,” Twin Commander was drafting a service bulletin *even though it was unsure if the FAA would approve it, given the limited information available.* *Id.* In

sum, this email provides Plaintiffs not a scintilla of support for their claim of a knowing misrepresentation to the FAA.

Finally, Plaintiffs contend that Service Bulletin 235 contained misrepresentations or is evidence of concealment itself, because in it, “Twin Commander reported only the Texas and Georgia incidents to the FAA” without referencing the 1992 Denver incident, the 1982 Arkansas incident, or the “four known cases” similar to the Denver situation. (Appellants’ Br. at 32.) Of course, as discussed above, each one of these incidents was already known to the FAA, as it had been an active participant in the investigations of each incident. Further, Plaintiffs do not cite any regulation specifying the information that must be included in a service bulletin. Beyond that, Plaintiffs treat Service Bulletin 235 as if it were the only communication that Twin Commander had with the FAA following the Georgia incident, which they know to be untrue. (*See, e.g.*, CP 3783-3823 (Correspondence between FAA and Twin Commander and minutes of meetings between FAA and Twin Commander).) Twin Commander—which came into existence in 1989—has endeavored to work closely with the FAA, NTSB, service centers, and owners and operators to resolve all issues that became known to the company. In fact, the story behind Service Bulletin 235 presents a telling picture of a company seeking to ensure the safety of its fleet in cooperation with the FAA, and acting quickly and effectively towards that end, even when the causes of the Georgia and Texas incidents were still unknown.

In short, Plaintiffs' effort to invoke GARA's fraud exception fails as a matter of law because they proffer no evidence of: (1) a knowing misrepresentation, concealment, or withholding; (2) of information required to be reported to the FAA; (3) and a causal link to the accident at issue. They provide no such evidence because none exists.

IV. CONCLUSION

For the foregoing reasons, the Court should affirm the order of the King County Superior Court granting summary judgment in favor of Twin Commander dismissing Plaintiffs' claims with prejudice.

DATED: February 19, 2008

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OF THE STATE OF WASHINGTON

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KENNETH C. BURTON, as Personal Representative of the ESTATE OF ULISES DESPOSORIOS SANTIAGO, and on behalf of ERIKA BARAJASA VASQUEZ, VIRGINIA DESPOSORIO BARAJAS, ULISES DESPOSORIO BARAJAS, TEOFILO UVALDO DESPOSORIO CABRERA, and IRENE SANTIAGO NAVA,

CERTIFICATE OF SERVICE

KENNETH C. BURTON, as Personal Representative of the ESTATE OF MARCELINO GONZALEZ ALCANTARA, and on behalf of ROSARIO FLORES ALVARADO, EDUARDO GONZALEZ FLORES, DANIEL GONZALEZ FLORES, and CHRISTIAN NANYELI GONZALEZ FLORES,

KENNETH C. BURTON, as Personal Representative of the ESTATE OF JUAN GALINDO HERRERA, and on behalf of REBECA ESCAMILLA MAGALLANES, ERICK GALINDO ESCAMILLA, and LILLIAN ITZE GALINDO ESCAMILLA,

KENNETH C. BURTON, as Personal Representative of the ESTATE OF PABLO LOZADA LEGORRETA, and on behalf of MARIA DE LOURDES EQUIVEL AVALOS, GERSON FABRICIO LOZADA ESQUIVEL, DIANA PAOLA LOZADA ESQUIVEL, and PRISCILLA LOZADA ESQUIVEL,

KENNETH C. BURTON, as Personal Representative of the ESTATE OF CESAR GABRIEL MAYA, and on behalf of STEPHANIE GUADALUPE MAYA TRIUJEQUE, and DIEGO HANNIEL MAYA TRIUJEQUE,

KENNETH C. BURTON, as Personal Representative of the ESTATE OF JESUS ARCINIEGA NIETO, and on behalf of ANGELICA MARGARITA ARIZMENDI GUADARRAMA, ESTEFANIA ARCINIEGA ARIZMENDI, JOSE FRANCISCO ARCINIEGA PEREZ, and CONSUELO NIETO TAPIA,

KENNETH C. BURTON, as Personal Representative of the ESTATE OF MARIANELA ELIZARDI RIOS, and on behalf of MARIANELA AIDA QUEZADA ELIZARDI, and AIDA MAGDALENA RIOS DE ELIZARDI,

Appellants,

v.

TWIN COMMANDER AIRCRAFT LLC, formerly known and doing business as TWIN COMMANDER AIRCRAFT CORPORATION; and DOES 1-20,

Respondents.

On Tuesday, February 19, 2008, I certify that I served **Brief of Respondent** on the following counsel of record:

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